Office - Supreme Court
FILED
NOV 24 1952

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 418

SOUTHERN PACIFIC COMPANY (a corporation),
Petitioner,
vs.
OVE E. ERICKSEN,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

MELVIN M. BELLI,
LEO FRIED,
240 Stockton Street, San Francisco 8, California,
Attorneys for Respondent Ove E. Ericksen.

WILLIAM P. CALLAHAN,
690 Market Street, San Francisco 4, California,
Of Counsel.

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Questions presented	2
Statement	3
(1) The plaintiff's employment record	3
(2) The method of inspecting and loading ties at Cheney Lumber Company	4
(3) The safe way and notice to the defendant	7
(4) The accident	8
(5) Interstate commerce	8
Argument	11
(1) Employee was engaged in interstate commerce within the meaning of the Act	11
(2) Railroad was within the Act	14
(3) The test applied by the Supreme Court of California was correct	15
(4) Negligence	16
Conclusion	17

Table of Authorities Cited

Cases	Pages
Bailey v. Central Vermont R.R., 319 U.S. 350, 63 S. Ct. 1062	16
Hall v. So. Pac. Co., 71 F. Supp. 21	13
Lehigh Valley R. Co. v. Huhen (1925), C.C.A. 2d, 10 Fed. 2d 78, cert. denied 270 U.S. 641	12
Porter v. Terminal R. Ass'n of St. Louis, 327 Ill. App. 645, 65 N.E. 2d 31	16
Rainwater v. Chicago R. I. P. Ry. Co. (1945), 207 La. 681, 21 So. 2d 872	12
Shanks v. Delaware, etc. R. Co., 239 U.S. 556	15, 17
Tennant v. Peoria & P. U. Ry. Co. (1944), 64 S. Ct. 409	14
Terminal R. Ass'n of St. Louis v. Fitzjohn (1948), 165 F. 2d 473	16, 17
Vaught v. East Tennessee & W. N. C. R. Co., 255 S.W. 595, 29 A.L.R. 1202	12
Wilkerson v. McCarthy, 336 U.S. 53, 93 L.Ed. 497	17
Zenz v. Industrial Accident Commission, 176 Cal. 304, 168 Pac. 364	12

Statutes	
Federal Employers' Liability Act as amended in 1939, Act of April 22, 1908, c. 149, 35 Stat. 65; Act of August 11, 1939, c. 685, 53 Stat. 1404	2, 3, 11, 14, 15
28 U.S.C. Section 1257(3) and Section 2101(c)	2
45 U.S.C. Section 51ff	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No.

SOUTHERN PACIFIC COMPANY (a corporation),
Petitioner,
vs.
OVE E. ERICKSEN,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the California District Court of Appeal rendered August 8, 1951 is at page 107ff of the record. It is reported in 105 A.C.A. 1018 and 234 P. (2d) 279.

The opinions of the Supreme Court of California appear in the record at page 145ff. The opinions are reported in 39 A.C. (2d) 385, 246 P. (2d) 642.

JURISDICTION.

The judgment of the Supreme Court sought to be reviewed was rendered and filed on July 31, 1952. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1257 (3) and § 2101 (c).

STATUTE INVOLVED.

The action was brought and prosecuted under the Federal Employers' Liability Act as amended in 1939, Act of April 22, 1908, c. 149, 35 Stat. 65; Act of August 11, 1939, c. 685, 53 Stat. 1404; 45 U.S.C. § 51ff. A copy of the applicable provisions, as they appear in 45 U.S.C. is appended hereto. (App. A.)

QUESTIONS PRESENTED.

The petitioner has raised four questions which we choose to restate, as the language of the questions, as stated by petitioner, creates inferences which we feel are not supported by the record. Furthermore, they are not in accord with the jury's verdict. The questions restated are:

(1) Was "any part" of the employee's duties, as shown by the record in this case, in "the furtherance of interstate or foreign commerce" or did it "in any way directly or closely and substantially, affect such commerce"?

(2) Was the railroad, as reflected by the record in this case, acting as a "common carrier by railroad"

and was it "engaging in commerce between any of the several states"?

(3) Was the Supreme Court of California correct in making the sole test of application of the Federal Employers' Liability Act as amended the ascertainment of whether the injured employee came within the language of the second paragraph of § 1 of the Act? Was it correct in holding "It is unnecessary to discuss the nature of the defendant employer's activities. When the employee's duties are shown to have had the required effect on interstate commerce he is 'deemed' to have been employed by a carrier engaged in that commerce"?

(4) If the Federal Employers' Liability Act does apply did the railroad owe the employee a duty to provide a safe place to work even though the place of employment was on the premises of a third person?

STATEMENT.

We feel that much of petitioner's argument is based upon a view of the record which is not warranted after a jury verdict for the respondent plaintiff. For this reason we are restating the facts, and in the instances which we deem important are quoting the record directly.

(1) The plaintiff's employment record.

The plaintiff, Ove Ericksen, has been employed by Southern Pacific Company as a lumber inspector

since 1918. (R. 16.) In recent years he has worked out of Portland, Oregon. From Portland he traveled to the various locations where the inspections were to be made, such as, Seattle, Tacoma, and Longview, in the State of Washington, and Eugene, Roseburg and Central Point, in the State of Oregon. (R. 19.)

The chief lumber inspector for Southern Pacific Company was in Portland, Oregon, and it was this man who ordered the inspectors to various jobs. (R. 20.) A Mr. Campbell was the chief lumber inspector at the time of the injury complained of and it was he who ordered Mr. Ericksen to go to Central Point, Oregon. (R. 20.)

(2) The method of inspecting and loading ties at Cheney Lumber Company.

The accident occurred on the 17th day of June, 1947, at approximately 2:30 P.M. at Cheney Lumber Company in Central Point, Oregon. (R. 16-17.) Mr. Ericksen was at Central Point upon the orders of the chief lumber inspector for the purpose of inspecting railroad ties which had been, or were to be purchased, by Southern Pacific Company. (R. 42-43.) It was while inspecting these ties that Mr. Ericksen was injured. (R. 28.)

The ties were stacked on a loading dock owned by the Cheney Lumber Company. (R. 23-24.) The dock was approximately 150 to 200 feet long. (R. 21.) From the edge of the dock to the ground below was approximately 10 to 11 feet. (R. 21.) On the ground below adjacent to and parallel with the

edge of the dock were two railroad tracks owned by Southern Pacific Company. (R. 23-24.) On these tracks the company spotted cars so that the ties could be loaded and shipped. (R. 22.)

On the afternoon of June 17, 1947, at about 2:30 o'clock there was a pile of 150 to 200 ties stacked along the edge of the dock. (R. 73.) An individual tie is approximately seven inches by nine inches by eight feet. (R. 22-23.) The ties were piled about 15 feet high (R. 28) and the ends of the ties were flush with, or protruded slightly over the edge of the dock. (R. 28.)

We will quote the record directly to show the method used for inspecting ties:

(R. 41-42):

"Q. Mr. Ericksen, when you examined these ties, you examined them to see whether or not they are square or—on the ends, is that right?

A. I beg your pardon.

Q. You examine these ties to see whether or not they are rectangular on the ends, is that right?

A. Examine them for splits and rots and bit knots and——

Q. Bark?

A. ——and bark and stuff like that.

Q. And you examine each tie?

A. (Witness nods head.)

Q. Do you examine these ties when they are piled? Do you examine all the ends together?

A. We go to the end and examine probably forty or fifty ties; then we mark them with a piece of crayon, those what we reject, and the man in the car, he watches them and he tells us when he gets to those marked ties, and puts them out."

(R. 56):

"Q. You inspect them on all four sides, do you?

A. Yes.

Q. And both ends, and grade them and enter them in your tally book; now, when do you do that?

A. They have generally one man outside and one man in the car. The fellow outside, he will turn them over for you, and I will look at them and if it is a select tie, I will mark it in my tally book as select, and it is number 1. I will tally it as number 1.

Q. You look at each tie individually before it is loaded in the car?

A. That's right.

Q. Where do you usually stand when you are doing that inspection?

A. When we do that inspecting, after we look at those ends—we look at the ends toward the railroad track, then we go back in the driveway and we stay at the end of them, stand at the end of the ties, if the pile is low enough. If the dock is full of ties then you will have to get on top of those piles and inspect them, haven't got any other place to stay. You have to get on top of them, and they shove from the top of the pile into the car.

Q. Then you look at each tie, turn it over and look at both ends, before it is put in the car?

A. Correct."

(3) The safe way and notice to the defendant.

(R. 35-36):

"Q. Now, Mr. Ericksen, you have worked at the places you say, at Longview, Tacoma, Eugene and Seattle. Is there a custom there with respect to the inspection of lumber?

A. Yes.

Q. Do you know what that custom is?

A. Yes.

Q. What is that custom?

A. The biggest part of the mills keep the lumber away from the edge of the dock so you can step up and take a look at it.

Q. At these places do they have any carriers?

A. Yes, most places now have those lumber carriers and lift trucks which pick up the units and bring it up to the car and set it right in front of the car, which give you ample place to work around and inspect your lumber and also turn it and see every piece of it.

Q. Mr. Ericksen, you say Mr. S. P. Campbell is your immediate superior?

A. Yes.

Q. Have you ever discussed the condition of the platform at Central Point with him?

A. Yes.

Q. And where did you talk to him about it?

A. At the office in Portland.

Q. And about when?

A. Well, it's perhaps about, five, five weeks or so before I fell off, I came very near falling off one day, and when I come in to Portland we started to talk about the different mills and how they piled their lumber and so forth and so on, and I suggested that it wasn't—they didn't leave room enough down at Central Point."

(4) The accident.

The accident occurred on June 17, 1947, at about 2:30 P.M. when Mr. Ericksen was inspecting the end of the tie pile flush with the dock. Mr. Ericksen stood at the edge of the dock facing the pile. He held on to the pile with his right hand and standing on his right foot leaned out over the edge of the dock to inspect the ends of the ties. After completing his inspection he started to return to a normal position. As he placed his left foot down and while still off balance his foot slipped or turned on something. He fell off the dock to the ground below. (R. 29-30.)

(5) Interstate commerce.

"Q. Do you load any of those?

A. Well, we help once in awhile, turn a few over and help shove a few in once in awhile.

Q. When it comes to the turning over the ties, do you do that?

A. Some times, yes.

Q. Who directs the loading of the ties? Who determines which ties are to be loaded?

A. The inspectors.

Q. That is you. Can they load ties without your approval?

A. No." (R. 24.)

"Mr. Fried. Q. After the ties are loaded into each car, is the door closed?

A. Yes.

Q. Who closes the door?

A. The loaders generally close the door, but they are not sealed.

Q. Do you assist in the closing of the doors?

A. Yes." (R. 25-26.)

"Q. And these ties are shipped out of the state, are they?

A. I beg your pardon.

Q. Are these ties shipped out of the State of Oregon?

A. Well, yes, the biggest part of them are." (R. 26-27.)

"Q. Now, where are these ties generally shipped to?

A. Well, there is a big territory to cover. They are shipped some into Southern Pacific Railroad of Mexico; they shipped others back to Houston, Texas, and ship some down to St. Louis & Southwestern, and Pacific Electric, and Pacific Fruit Express." (R. 25.)

"Q. Now, do you know what use these ties are put that you load, what are they used for?

A. They are put in the railroad track.

Q. Well, can you state whether or not they are used, put in new tracks, or old tracks?

A. They are put in new tracks and they are also used for replacement; they take out the old, worn-out ties and put in new ties.

Q. Are some of these ties sent to the creosote plant in West Oakland?

A. Yes.

Q. Are all of them sent to creosote plants?

A. No.

Q. Which ties are not sent to creosote plants?

A. It all depends on how much of a hurry they are for their ties. If they are short of ties they will take them right from the loading dock and put them in the track without being treated.

Q. From what loading dock?

A. Well, from Cheney, from wherever they happen to have ordered all those ties.

Q. Let us see if we can clear it up a little for the jury. Let us take a tie, for example, that is not creosoted. What happens to that tie, step by step?

A. It is put into the load——

Q. First it is put into the box car?

A. That's right.

Q. Then where does it go?

A. It goes out to the road where they need it. It is shipped out." (R. 27.)

"Q. Where is it unloaded?

A. Along the railroad tracks.

Q. It is unloaded along the railroad tracks, and what is done with it at that point?

A. They put it in the track.

Q. Without being creosoted?

A. Yes.

Q. Some of these ties, I understood you to say, are used on the main line and some are used for switching tracks?

A. Yes.

Q. Now, Mr. Ericksen, is it necessary for you to inspect these ties on the dock before they are put into the car itself?

A. Yes, absolutely.

Q. And why is that?

A. Because that is the only way you could inspect them.

Q. Why couldn't you have them put the tie into the car and inspect it there?

A. No, because if you get in the car and they start and throw those ties in you are liable to get killed, because those ties hit the floor of the car and they bounce every place.

Q. Well, suppose they load it into the car and you found it was a reject tie, what would have to be done with it?

A. You would have to take it out." (R. 27-28.)

As a result of his fall Mr. Ericksen suffered a crushing fracture of the heelbone (os calcis). He was awarded a verdict of $18,000.00 by the jury from which defendant has appealed.

ARGUMENT.

Petitioner has raised four questions, which we will treat individually, in the order raised by petitioner, for the purpose of showing why the writ should not issue.

---

(1) EMPLOYEE WAS ENGAGED IN INTERSTATE COMMERCE WITHIN THE MEANING OF THE ACT.

Mr. Ericksen was, at the time of his injury, a lumber inspector. We take it as self-evident that his title is not determinative of his status under the Federal Employers' Liability Act. Looking at the record we

see that his inspection of ties was an integral part of the loading procedure which put these ties into cars destined for interstate points. Other cases brought under this act which have held an employee who loads cars with goods destined for interstate commerce to be within the act are:

Zenz v. Industrial Accident Commission, 176 Cal. 304, 168 Pac. 364;

Vaught v. East Tennessee & W. N. C. R. Co., 255 S.W. 595, 29 A.L.R. 1202;

Lehigh Valley R. Co. v. Huhen (1925), C.C.A. 2d, 10 Fed. 2d 78, cert. denied 270 U.S. 641.

All of these cases were decided before the 1939 amendment to the act.

Rainwater v. Chicago R. I. P. Ry. Co. (1945), 207 La. 681, 21 So. 2d 872, was decided after the amendment. In that case the employee of the railroad was loading its posts on a car to be taken for immediate use in the repair of track. The Court held that the employee would have been covered by the act prior to the 1939 amendment. We feel that the respondent here is in the same position.

In *Lehigh Valley R. Co. v. Huhen,* supra, the Court said:

> "Where the facts show the case may well have been within the statute, the initial burden is satisfied, and it is for the defendant to show the contrary."

As the petitioner has pointed out, the only evidence adduced, other than medical, was introduced by re-

spondent. The relationship of the ties to interstate commerce, their destination and intended use, would be peculiarly within the knowledge of petitioner. Yet nothing was said by the railroad.

Since the 1939 amendment numerous cases have been decided, similar in their fact situations, which bring respondent within the act. These have been collected in *Hall v. So. Pac. Co.*, 71 F. Supp. 21, and include

> "employees loading barrels of oil to be used in filling lanterns and oil cans used in oiling railroad engines and machines (Harris v. Missouri Pac. R. Co., 1944, 158 Kan. 679, 149 P. 2d 342); blacksmith's helper engaged in making locomotive parts (Trucco v. Erie R. Co., 1946, 353 Pa. 320, 45 A. 2d 20); trackman, employed in spreading cinder ballast in surfacing tracks (Agostino v. Pennsylvania R. Co., 1943, D.C.N.Y., 50 F. Supp. 726); employee of roundhouse, the facilities of which were used in housing and preparing locomotives (Zimmerman v. Scandrett, 1944, D.C.S.C. Wis. 57 F. Supp. 799); guard at a terminal (Albright v. Pennsylvania R. Co., 1944, 183 Md. 421, 37 A. 2d 870); section hand laying rails on roadbed to aid in raising interstate track (Missouri Pac. R. v. Fisher, 1944, 206 Ark. 705, 177 S.W. 2d 725); employee loading posts to be used in repairing roadway (Rainwater v. Chicago, R.I.P. Ry. Co., 1945, 207 La. 681, 21 So. 2d 872); employee whose duty it was to clean up the railroad's tracks used partly to carry interstate commerce (Piggue v. Baldwin, 1942, 154 Kan. 708, 121 P. 2d 183); railroad's emergency flood con-

trol worker, whose duty it was to fill sand bags and place them on a flat car which was to move over tracks used for movement in interstate commerce, the bags being placed along the tracks to protect them from existing flood waters (Skanks v. Union Pacific Railroad Co., 1942, 155 Kan. 584, 127 P. 2d 431); section laborer helping maintain and repair tracks used for interstate trains. (Prader v. Pennsylvania Ry. Co., 1943, 113 Ind. App. 518, 49 N.E. 2d 387, 389)."

A comparison of these cases with our own shows clearly that respondent falls within that class of cases which have been judicially determined to meet the requirements of the 1939 amendment to the Federal Employers' Liability Act.

---

(2) RAILROAD WAS WITHIN THE ACT.

We have quoted the portion of the record having to do with interstate commerce. From it, we think the jury could fairly conclude that the Southern Pacific Company brought its cars, on its tracks, to a point adjacent to the Cheney Lumber Company dock. There they were, in a continuous operation, inspected and loaded, with ties, some of which were destined for immediate use in interstate track, others were going to Texas, California and Mexico.

There can be no doubt that it is the jury's function to draw the conclusions. *Tennant v. Peoria & P. U. Ry. Co.* (1944), 64 S. Ct. 409.

If the jury could fairly conclude as we have stated, then petitioner's second question, as it states it, is never raised.

We have heretofore cited cases in which the loading of goods destined for interstate shipment was held to be interstate commerce. Can there be any question but that the railroad meets the test of the *Shanks* case: that it was in interstate transportation or work so closely related to it as to be practically a part of it?

---

(3) THE TEST APPLIED BY THE SUPREME COURT OF CALIFORNIA WAS CORRECT.

The California Supreme Court said:

> "When the employee's duties are shown to have had the required effect on interstate commerce he is 'deemed' to have been employed by a carrier in that commerce."

The petitioner's objection to this test is that the railroad must be found to be engaged in commerce whereas the employee may further or affect such commerce.

That petitioner's position is untenable is immediately apparent from an examination of the United States Senate Report on the 1939 Amendment to the Federal Employers' Liability Act. This is printed in Appendix C in the petition.

The main purpose of that portion of the amendment which we now discuss was to do away with the

moment of injury test. The Congress clearly recognized the difficulties which this test placed upon employees trying to prove a case under the act. The Congress intended to alleviate the employee's burden in this respect.

Petitioner would now have us believe that Congress intended to do away with this test for the employee but apply it to the employer. The employee, says petitioner, need not prove he was in interstate commerce at the moment of injury but he must prove that the employer was.

Congress could hardly intend to remove one difficulty and substitute the same one in different words.

---

(4) NEGLIGENCE.

The railroad owes a duty to its employees to provide them with a safe place to work.

Bailey v. Central Vermont R.R., 319 U.S. 350, 63 S. Ct. 1062.

This duty is owed even though the premises where plaintiff was sent did not belong to and were not under the control of the defendant.

Terminal R. Ass'n of St. Louis v. Fitzjohn (1948), 165 F. 2d 473;

Porter v. Terminal R. Ass'n of St. Louis, 327 Ill. App. 645, 65 N.E. 2d 31.

Every Court before whom this case has appeared has agreed that this duty exists. The dissenting jus-

tices of the California Supreme Court do not disagree with the *Fitzjohn* case. They attempt to distinguish it.

The respondent came within the act as it was before 1939. There is no doubt that if the employee met the test of the *Shanks* case (*Shanks v. Delaware, etc. R. Co.*, 239 U.S. 556), the employer must likewise meet it.

We have quoted the record showing wherein the duty was breached. There is ample evidence to sustain a jury verdict.

Wilkerson v. McCarthy, 336 U.S. 53, 93 L.Ed. 497.

CONCLUSION.

For the foregoing reasons it is prayed that the petition for certiorari be denied.

Dated, San Francisco, California,
November 21, 1952.

Respectfully submitted,
MELVIN M. BELLI,
LEO FRIED,
Attorneys for Respondent Ove E. Ericksen.

WILLIAM P. CALLAHAN,
Of Counsel.

(Appendix A Follows.)

Appendix A

45 U.S.C. § 51: Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.